would have been a very different matter if the appellants had been outsiders and not employees of the estate or if they had even as employees come out to pick the bags at some very late hour of the night or in the very early hours of the morning.

The apprehension of the appellants was indeed premature. The ambush was sprung a little too soon. A few more minutes would have been sufficient to find out if the appellants were intending to take the bags to the store or out of the estate itself or to some unauthorised or secret place and this would have afforded ample proof of their guilt or innocence. In all the circumstances of the case therefore I did not think that the evidence adduced in the lower court was sufficient to establish a case against the appellants beyond reasonable doubt. I accordingly set aside the conviction and sentences against the appellants and ordered that they be acquitted and discharged.

Appeal allowed.

Solicitors: *A.K.J. D'Cruz & Co.*

SUBRAMANIAM v. MENTERI HAL EHWAL DALAM NEGERI & ORS.

[O.Cr.J. (Abdul Hamid J.) September 24, 1976]
[Kuala Lumpur — Criminal Application No. 13 of 1976]

Administrative Law — Preventive Detention — Failure to consider written representations of detenu within three months of detention — Whether breach of substantive right or merely a matter affecting procedure — Whether continued detention unlawful — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, s. 6(1) — Federal Constitution, art. 151.

The applicant applied that a writ of *habeas corpus* be issued for his release. The applicant had been detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. He had made written representations against the order of detention but no inquiry had been held, although three months had elapsed since his detention. It appeared from an affidavit filed by the Secretary of the Advisory Board that the representations of the applicant were received on November 15, 1976 and had been fixed for hearing on September 21, 1976.

Held: (1) it is probably open to a detenu to say that by right the Advisory Board should hear his representations and make recommendations thereon within three months but it is obvious that such a right cannot be held to be a real and substantial right of a citizen guaranteed by the Constitution an infringement of which may justify the court to award a Writ of *Habeas Corpus;*

(2) in this case there has been a failure to comply with the statutory direction but mere non-compliance with the directory provision, so long as the Advisory Board considers the representations and makes its recommendations, should not render unlawful a detention lawfully made.

Cases referred to:-

(1) *Dharam Singh* v. *State of Punjab* A.I.R. 1958 S.C. 152.

(2) *Abdul Karim* v. *State of West Bengal* A.I.R. 1969 S.C. 1028.

(3) *S. Mukherjee* v. *State of West Bengal A.I.R.* 1972 S.C. 1356.

(4) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129.

CRIMINAL APPLICATION.

Karpal Singh (*K. Kumaraendran* and *K. Balasundram* with him) for the applicant.

Abdul Kadir Musa, Federal Counsel, for the respondents.

Abdul Hamid J.: The applicant Subramaniam s/o Muthiah @ Muthiya has asked that a Writ of *Habeas Corpus* be issued to direct the Menteri Hal Ehwal Dalam Negeri Malaysia, Ketua Polis Negara Malaysia and the Penguasa Kanan Pusat Pemulihan Akhlak, Pulau Jerejak, the respondents, to have the applicant brought before this court to undergo and receive all and singular such matters and things as this court shall then and there consider concerning him upon the grounds set forth in his affidavit.

It is claimed that the applicant is a Malaysian citizen. He was detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 (I shall hereafter call "the said Ordinance") at the Pulai Jerejak Rehabilitation Centre under an order of detention dated 5th of March 1976 made by the Menteri Hal Ehwal Dalam Negeri Malaysia. The applicant made written representations against the said order to the Chairman of the Advisory Board on March 15, 1976 and to-date no enquiry has been held by the Advisory Board.

The facts do not seem to be in dispute.

It is the applicant's contention that his detention exceeding three months is not in compliance with section 6 of the said Ordinance and the mandatory provisions of Article 151(1)(b) of the Federal Constitution thereby rendering his continued detention after 5th of June 1976 unconstitutional.

An affidavit in reply was filed by N.S. Hullon Secretary to the Advisory Board stating that the applicant was arrested on 8th of June 1976 and the order of detention was made on 15th of March, 1976. The applicant made representations on 15th of March, 1976 and they have been submitted to the Chairman Advisory Board and have been fixed for hearing on 21st of September, 1976.

For easy reference I set out below the relevant provisions alleged to have been infringed, namely, (a) section 6(1) of the said Ordinance and (b) Article 151(1)(b) of the Federal Constitution — (I shall hereafter call "the impugned Article").

(a) "6. (1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong."

(b) "151. *Restrictions on preventive detention.*

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(a) ....

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong."

Mr. Karpal Singh counsel for the applicant submitted that it is apparent from the impugned Article that the opportunity afforded to the applicant to put forward his case to the Advisory Board and to have his representations heard by the Advisory Board within three months of the period of detention and recommendations made thereon is a substantive and real right guaranteed by the Constitution. He urged the court to take into consideration Article 5(1) of the Federal Constitution which provides that "no person shall be deprived of his life or personal liberty save in accordance with law."

Encik Abdul Kadir Musa appearing on behalf of the respondents says that the facts are not in dispute; what is disputed is only law. The respondents maintain that Article 151(1)(b) of the Federal Constitution is only procedural. The respondents further maintain that the right of a person detained to have representations heard is a substantive right and only a violation of that right would render the detention illegal whereas a delay in hearing the representations relates only to a matter affecting procedure and would not render the detention illegal provided the representations are heard within a two-year period of detention.

It seems unnecessary for me to delve in great detail on the question of the right of the applicant to make representations to the Advisory Board. It is evident that such right is a right guaranteed by the Constitution and any violation or infringement of such right may render the detention illegal. It is also evident that the impugned Article is not merely procedural and that its infringement may also render the detention illegal. In the light of the facts of this particular case, however, it seems appropriate that critical analysis of the impugned Article as well as other provisions pertinent be made to enable the court to determine their nature and effect. It needs no emphasis that laws involving freedom and fundamental liberty of the subject must be construed with the utmost care.

Mr. Karpal Singh cited three Indian authorities to support the applicant's contention, namely, *Dharam Singh* v. *State of Punjab*,[1] *Abdul Karim* v. *State of West Bengal*[2] and *S. Mukerjee* v. *State of West Bengal*.[3] Two of them were cited and relied upon by counsel in a similar application before Arulanandom J. in High Court Penang Miscellaneous Criminal Applications Nos. 13 and 14 of 1976. In that case, however, an enquiry was held but the Advisory Board had not made its recommendations within the three-month period. In the course of his judgment Arulanandom J. had expressed agreement with the decisions in those two cases having regard to the circumstances of those particular cases. And in the light of the provisions of Article 21 of the Indian Constitution he felt constrained to consider "the question of the detention becoming illegal through acts not being performed within the time-limit prescribed by both section 6 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, and Article 151(1)(b) of the Constitution in the light of our decided cases." He relied upon the decision of the Federal Court in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri Malaysia*[4] where he said the Federal Court made a distinction between "law" and procedure. Arulanandom J. then held that "considering the present complaint by the detenus in the light of the above decision by which I am bound, I have to concede that if one separates fundamental law from procedure in both section 6 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, and Article 151(1) and (2), one would have to admit that the requirement that the Advisory Board must meet within a period of three months is only procedural. The acts which are required by law to be done had been done albeit they were done outside the time-limit prescribed by law."

For my part I too see no reason to disagree with the decisions of the Indian Courts having regard to the Indian law. As for *Karam Singh's case, supra,* it seems to me that one of the principles underlying the Federal Court decision is that defect in the detention order if one of form only and not of substance does not make unlawful a lawful order of detention. The issue raised in *Karam Singh's case, supra,* is not quite similar to the issue raised in the instant case although I must admit some rationale may be drawn from the decision in that case. The real issue before this court is whether the failure of the Advisory Board to consider the representations and to make recommendations thereon to the Yang Dipertuan Agung within a period of three months as required under section 6(1) of the said Ordinance constitutes a breach or infringement of a real and substantive right of the applicant as guaranteed by the Constitution. Apart from the impugned Article and section 6(1) of the said Ordinance reliance is also placed upon Article 5(1) of the Constitution. Speaking of Article 5(1) of the Constitution the court must necessarily view it in the light of Article 149 which declares that "If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation" to do any of the matters provided in paragraphs (a) to (e) "any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10. . . ."

Ong H.T. C.J. (as he then was) in *Karam Singh's case, supra,* at page 140 in the course of his judgment said "That, in the interests of national safety, personal inconvenience in individual cases must give way is explicitly recognised by the framers of the Constitution in Part XI, articles 149 to 151." Tun (Dr.) Mohd. Suffian in his book "An Introduction to the Constitution of Malaysia" second edition at page 240 under that part dealing with preventive detention has succinctly stated that "Ideally no person should be detained except after a proper public trial conducted fairly in accordance with the law, but in some countries such as even India it is recognised that in the public interest the State should in certain circumstances be armed with the power of preventive detention, i.e. detaining a person without trial for the purpose of preventing him from doing acts prejudicial to the public interest."

In consideration of what I have stated I feel constrained to say that it is in that light that the courts should proceed to determine an allegation of encroachment of a person's fundamental liberty under the Constitution.

The courts are equally anxious to see that fundamental liberty of the subject is safeguarded, nonetheless,

they must not readily lend their jurisdiction to unnecessarily interfere unless an infringement alleged to have been occasioned relates to an infringement of a real and substantive right of that individual as guaranteed by the Constitution. The courts must not be so blinded by legal niceties that their approach to the whole issue will become very unrealistic.

The powers of detention are, however, not without safeguards. One of the safeguards is provided under the impugned Article. If in the present case the court is to hold that there is validity in the applicant's contention that there has been an infringement of his substantive right, it is implicit that some express provision be laid down under that relevant Article requiring that an enquiry be held and recommendations made within the period of three months from the date of detention.

I am of course fully aware of the applicant's further contention that the impugned Article read in the light of section 6(1) of the said Ordinance should be construed to mean that the Advisory Board, within three months of the date a person is detained, must consider his representations and make recommendations thereon to the Yang Dipertuan Agung. At the outset it may appear to be so but on careful analysis it seems crystal clear that if the applicant's contention is to succeed, the court must consider that the special requirement provided under section 6(1) of the said Ordinance must necessarily be regarded as a right given to a detenu which right is guaranteed by the Constitution. Such a construction is not in my considered judgment tenable and reconcilable in the absence of similar provision under Article 151(1)(b). The special requirement is, to state the obvious, only to be found in the ordinance promulgated by the Yang Dipertuan Agung under Article 150(2) of the Constitution. It is not my intention to decide whether or not section 6(1) should prevail over the impugned Article but obviously it cannot seriously be suggested that it is the objective of the said Ordinance to pronounce therein the fundamental right and liberty of a subject. The said Ordinance is strictly one which provides for miscellaneous matters essential for the proper enforcement and execution of duties and functions connected with preventive detention.

It is inconceivable, in my view, that such provision should be construed as forming part of and read into Article 151(1)(b) of the Constitution. In consideration, I would say that while the impugned Article has expressly afforded a safeguard to a person under preventive detention, section 6(1) of the said Ordinance is in effect in the nature of a statutory direction to the Advisory Board. It is probably open to a detenu to say that by right the Advisory Board should hear his representations and make recommendations thereon within three months but it seems obvious to me that such right cannot be held to be a real and substantive right of a citizen guaranteed by the Constitution an infringement of which may justify the court to award a Writ of *Habeas Corpus*. It cannot for a moment be doubted that there has been a failure to comply with the statutory direction but I am not prepared to hold that it is open to this court to go behind such failure to inquire the causes of it. In the final analysis it is my finding that mere non-compliance with the directory provision, so long as the Advisory Board considers the representations and makes its recommendations, should not I think render unlawful a detention lawfully made.

Finally, I would briefly refer to the case of *S. Mukerjee* v. *State of West Bengal, supra*, cited by Mr. Karpal Singh. The decision in that case is that in the light of Article 22 of the Indian Constitution, the maximum period for which the detaining authority can on its own satisfaction detain a person is three months and that if the order confirming the detention and its continuation is passed after the expiry of three months, then the detention is illegal. I do not see how I can possibly disagree with that decision. It seems evident that it provides support of the very proposition I have expressed in this judgment. The reason underlying the decision in *Mukerjee's case, supra*, was that Article 22 of the Constitution requires that the report of the Advisory Board be obtained before the expiry of three months from the date of detention even though there was an absence of express words in section 12 of the West Bengal (Prevention of Violent Activities) Act (President's Act 19 of 1970).

For reasons that I have stated it is my considered judgment that the applicant has failed to establish a *prima facie* case to warrant an award of a writ of *habeas corpus*. I therefore dismiss the application.

Application dismissed.

Solicitors: *Kumar, Chan & Chia.*